

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CRAIG MICHAEL TUNSTALLE,

Defendant-Appellant.

UNPUBLISHED

October 4, 2007

No. 270636

Crawford Circuit Court

LC No. 05-002303-FH

Before: Jansen, P.J., and Fitzgerald and Markey, JJ.

PER CURIAM.

A jury convicted defendant of second-degree criminal sexual conduct, MCL 750.520c(1)(a), and first-degree home invasion, MCL 750.110a(2)(b), and the trial court sentenced defendant to concurrent prison terms of 3 to 15 years and 7 to 20 years for the respective convictions. Defendant appeals as of right. We affirm.

The then-twelve-year-old victim lived in a trailer home with her mother. Her bed was next to her bedroom window. Defendant allegedly opened that window from the outside in the middle of the night, reached his hand through, and sexually molested the victim over her clothing. The complainant awoke and ran screaming to her mother's bedroom.

Defendant first argues that the trial court erred when it scored 15 points under offense variable (OV) 10 for predatory conduct directed toward the victim. "A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score." *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). "This Court reviews a sentencing court's scoring decision to determine whether the trial court properly exercised its discretion and whether the record evidence adequately supports a particular score." *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003).

Fifteen points are scored under OV 10 for "[p]redatory conduct," which is defined as "preoffense conduct directed at a victim for the primary purpose of victimization." MCL 777.40(1)(a), (3)(a). The timing and location of an offense can be evidence of preoffense predatory conduct. *People v Witherspoon*, 257 Mich App 329, 336; 670 NW2d 434 (2003).

Here, evidence was presented that the victim regularly stayed with a babysitter at another location until retrieved by her mother once her mother finished working at around midnight. The night before the assault, defendant knocked on the victim's window after she returned home,

opened it, and possibly entered the victim's bedroom and turned off the television. On the night of the assault, the victim returned home after midnight. Defendant opened the victim's bedroom window, reached his arm into her bedroom, and assaulted her as she slept. This evidence shows that defendant had watched his victim, learning both her schedule and the location of her bedroom, and then waited for an opportunity to molest her when she was at her most vulnerable. *Id.* This evidence was sufficient to support a fifteen-point score for OV 10.

Defendant also argues that the trial court erred when it scored ten points for OV 9. Although defense counsel affirmatively accepted the score of OV 9 with regard to only the home invasion count, at sentencing defendant preserved this issue for review by filing a motion in this court to remand for resentencing. MCL 769.34(10); MCR 6.429(C); *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004).

Ten points are scored for OV 9 if there were two to nine victims. MCL 777.39(1)(c). At the time of sentencing in this case, each person who was placed in danger of physical injury or loss of life was to be counted as a victim. MCL 777.39(2)(a);¹ *People v Melton*, 271 Mich App 590; 722 NW2d 698 (2006). Defendant suggests that the victim's mother was not in danger of physical injury or loss of life because she was not in the victim's bedroom at the time of the offense. We disagree. The proper inquiry is whether other persons were placed in danger of injury during the incident. Although the victim's mother was not in the same room as the victim at the time defendant reached into the bedroom and sexually assaulted the victim, she was present in her bedroom approximately ten to fifteen feet from the victim's bedroom. It is very likely that the victim's mother would have gone to the victim's room when the victim began screaming had the complainant not first run from her room. Moreover, defendant could have easily entered the home, as he allegedly did the night before. The risk of injury presented by these circumstances justified the trial court's score of ten points for OV 9.

Defendant also argues that defense counsel was ineffective by failing to challenge the scoring for OV 9. This claim is without merit in light of our conclusion that the trial court properly scored ten points for OV 9. "Trial counsel cannot be faulted for failing to raise an objection or motion that would have been futile." *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998).

Affirmed.

/s/ Kathleen Jansen
/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey

¹ 2006 PA 548, effective March 03, 2007, amended MCL 777.39(2)(a) to provide that "each person who was placed in danger of physical injury or loss of life or property" was to be counted as a victim.